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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

PHILIP A. McLENNAN and
FRED H. BENDER, PETITIONERS

v.

UNITED STATES OF
AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No._____

PHILIP A. McLENNAN and FRED H. BENDER, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Fred H. Bender and Philip A. McLennan, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered October 19, 1977, which affirmed the judgment of the United States District Court for the District of Oregon.

OPINION BELOW

The opinion of the Court of Appeals is officially reported at 563 F.2d 943 (see Appendix, infra). The petition for rehearing

and suggestion for rehearing in banc was denied on December 2, 1977.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

1. Petitioners' non-profit corporations constructed seven college housing projects with funds borrowed from the Department of Housing and Urban Development. Petitioners received a portion of the architect's fees from the projects' architect. The question presented is whether such "kickbacks" are prohibited by the Copeland Act, 18 U.S.C. § 874.

2. Petitioners were indicted, inter alia, for conspiring to commit a violation of the Copeland Act, 18 U.S.C. § 874. At the close of the government's case, the trial judge dismissed this charge. The Court of Appeals held this dismissal to be improper. The question presented is whether inquiry by

the Court of Appeals into the propriety of this dismissal violates (a) the constitutional prohibition against double jeopardy, and (b) 18 U.S.C. § 3731, by in effect allowing the government the right to review of an order from which it did not and could not appeal.

3. Evidence concerning the Copeland Act charge (18 U.S.C. § 874) was conspicuous, and the Act was referred to by name in testimony. The Court of Appeals held that the trial court was not required to instruct the jury as to the meaning of the Copeland Act or that this charge had been dismissed. The question presented is, must a trial court inform the jury that a charge has been dismissed after evidence has been admitted dealing with the charge, in order to assure the jury's fair understanding of the matters before it?

4. Whether certain testimony of petitioners' former counsel was inadmissible

hearsay.[1]

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "* * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *."

18 U.S.C. § 3731 provides, in pertinent part:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

1. This question is not relied upon as a basis for the petition for a writ of certiorari, but is presented solely as a question which petitioners will also raise, with the permission of the Court, if certiorari is granted. The Court of Appeals' decision concerning the hearsay rule raises two novel issues under the new Federal Rules of Evidence: (1) whether Federal courts may apply a plastic, common law approach to rules of evidence that are codified and now subject to Congressional review and approval; and (2) whether the excited utterance ex-
(Cont.)

18 U.S.C. § 874 provides:

> "Whoever, by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever induces any person employed in the construction, prosecution, completion or repair of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, to give up any part of the compensation to which he is entitled under his contract of employment, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

Petitioners McLennan and Bender were convicted of (1) making false statements to the Department of Housing and Urban Development (HUD) and (2) conspiring to make such false statements and to defraud the United States, all in violation of 18 U.S.C. §§ 371, 1001 and 1010. The facts

1 (Cont.) ception may be extended to situations in which mere conversation is the exciting event, when the trial court has declined to make the requisite finding of excitability (contrary to Murphy Auto Parts Co. v. Ball, 249 F.2d 508, 511-512 (D.C.Cir. 1957), cert. denied, 355 U.S. 332 (1958) (opinion by Judge Burger)).

may be briefly summarized as follows:

Petitioners' two non-profit corporations--Adult Student Housing, Inc. (ASH), and Adult Student Housing of Memphis, Inc. (ASHM)--obtained loans from HUD under the College Housing Act of 1950, 12 U.S.C. §§ 1749, et seq. (1970), to design and construct seven college dormitory facilities. Architectural services on each project were provided by Charles R. Dahlen, a licensed architect. In connection with each project, Dahlen signed a standard owner-architect contract with ASH or ASHM to provide services for a stated fee. Apart from these contracts, Dahlen and petitioners had a written agreement (Deft.Ex.7) whereby Dahlen would devote his best efforts to providing architectural services to entities in which petitioners had an interest, in return for payment or provision of overhead and services and a monthly draw, as an advance

against fees for architectural services.

Petitioners' corporations received a total of $961,282 in HUD mortgage loan disbursements on account of architectural expenses. In various documents submitted to HUD from 1971 to 1975, petitioners stated these funds were paid or payable for "architectural services." Over $300,000 of this amount was received by Dahlen for compensation and expenses of himself and his office staff. Petitioners received the balance (approximately $600,000) prior to November, 1973, by checks drawn on the architect's account as consulting fees.[2]

The indictment charged in substance that petitioners had knowingly overstated

2. Petitioner McLennan testified these payments were pursuant to the agreement with Dahlen (Deft. Ex.7) for services which consisted of materially assisting the architect on the various projects and obtaining new business (R.809-817). (References to the reporter's transcript of the proceedings will be designated "R".)

the costs of architectural services, in violation of 18 U.S.C. §§ 1001 and 1010; conspired to cause Mr. Dahlen, the architect, to "kick back" a portion of his compensation under the owner-architect agreements, in violation of the so-called Copeland Act (18 U.S.C. § 874); and conspired to defraud the government of its right to conduct its programs free from deceit, trickery and illegality (18 U.S.C. § 371).

The primary defense to the fraud and false statement charges was that petitioners lacked the specific intent required to commit these crimes. As part of this defense, petitioners claimed that they had acted on the advice of their attorney, Mr. Burnett. The evidence showed that, in the spring of 1970, petitioners had advised Mr. Burnett that they wished to form a permanent entity, consisting of the owner-developer, architect, builder,

attorney and accountant, to construct and develop real estate on a "team" basis, sharing revenues from the projects (R.395-396). Burnett advised petitioner McLennan that the "Copeland Act" (18 U.S.C. § 874) would make it "difficult, probably impossible" to set up such an organization "without getting very elaborate" (R.399-401). Burnett did not advise petitioners of any other legal objection to the proposal. In 1972, Mr. McLennan asked Burnett how petitioners could legitimately share the large architectural fees generated by the projects, considering their substantial efforts and services rendered Dahlen (R.406,805). Burnett had said that the Copeland Act would not be infringed "once the money was Mr. Dahlen's", who "could do with it as he pleased, but that it had to go through the tax machine first" (R.424). Petitioner McLennan testified that he felt

he followed this advice (R.805-806).

According to Burnett, he first learned the transfers had occurred when informed of that fact by petitioner Bender in November, 1973. In response to the prosecutor's inquiry, Burnett testified that he said to Bender at that time, "For Christ's sake, I told you that was illegal" (R.407-409). Defense counsel objected on hearsay and relevancy grounds. The objections were overruled.

Burnett's statement ("I told you that was illegal") referred solely to illegality under the Copeland Act (R.399-401). During Burnett's testimony concerning the Act, Judge Skopil stated in the jury's presence that he would ultimately instruct the jury on the meaning of the Copeland Act (R.400).

A. DISMISSAL OF COPELAND ACT AND "KICKBACK" CHARGES

Prior to trial, the petitioners

moved to dismiss that part of Count I (the conspiracy charge) which charged them with conspiring to violate the Copeland Act (18 U.S.C. § 874), on the grounds that it could not apply to their transactions with a project architect (Ct. 164-176).[3] Judge Skopil denied the motion (Ct.178). Petitioners renewed the motion at the beginning of trial (R.2-3) and again at the close of the government's case (R.623-624), when Judge Skopil granted it and dismissed the charge, removing all allegations of illegal "kickbacks" (R.626).[4]

When all the evidence was in, defense counsel requested the court to instruct the jury prior to argument that the court had taken the Copeland Act and "kickback" portion of the indictment out of the case, because of references in the

3. References to the Clerk's transcript of record will be designated "Ct."

4. At the court's direction, all references to "kickbacks" were deleted as "portions of the indictment which I have * * * ruled out of the case"(R.925).

testimony and the indictment which the jury had heard (R.2, 925-927). Judge Skopil stated that he would inform the jury about the dismissal in his own way but warned defense counsel not to use dismissal of the Copeland act "as a weapon" in closing argument (R.928).

The court instructed the jury that it had "taken a portion of Count I away from the jury's consideration * * * purely as a matter of law and has nothing to do with the factual determination which you are to make on the other counts." The court stated it was advising the jury because "you might have wondered why the attorneys were not talking about those matters" (R.937-938). No mention was made by the court, at that time or thereafter, that the dismissed portion of the 21-page indictment concerned the Copeland Act.

In argument, the prosecutor quoted Burnett's testimony, "I told you that

was illegal," and stated that Burnett told petitioners that having an ongoing relationship with an architect would be "illegal because of the Copeland Act" (R.970-971,972-973,974). In closing argument, defense counsel mentioned without elaboration that the Copeland Act was "out of the case" (R.998-1047). The prosecutor recalled the Copeland Act testimony again in rebuttal, without acknowledging dismissal of the charge (R.1062-1064).

B. <u>THE DECISION OF THE COURT OF APPEALS</u>

Petitioners raised two issues on appeal: (1) whether Burnett's testimony was inadmissible hearsay and irrelevant; and (2) whether the District Court erred in failing to tell the jury the Copeland Act had been dismissed from the case.

The Ninth Circuit affirmed the conviction. Judge Duniway wrote the opinion of the court, Judge Choy specially concurred in a separate opinion and

Judge Ely dissented. The panel was in internal disagreement on both points raised on appeal.[5]

Judge Duniway held that the District Court's failure to instruct the jury with respect to dismissal of the

5. The controversy concerning the hearsay point resulted in two judges concurring that the judgment should be affirmed, but on contradictory grounds. Judge Duniway found Burnett's testimony to be nonhearsay because it was notice to the petitioners that Burnett disapproved the transfers from the architect (which had then already taken place) and stated that Burnett's 1973 assertion that he had earlier so advised the petitioners simply made the statement stronger.

Judges Choy and Ely found that the statement was hearsay and would be inadmissible under F.R. Evid. 801 and the rule of U.S. v. Freeman, 519 F.2d 67 (9th Cir.1975).

Judge Choy, however, held that the evidence should nevertheless have been admissible under either a newly created Federal common law exception to the hearsay rule, pursuant to F.R. Evid. 803(24), allowing in as substantive evidense any prior statement of a witness; or as an "excited utterance." Even so, Judge Choy would have held the admission of the hearsay without a limiting instruction to have been plain error if the Copeland Act were rightly dismissed. 563 F.2d at 954, n. 7.

Judge Ely, in agreement with Judge Duniway on this point, specifically stated that the evidence could not be held admissible as an excited utterance; and Judge Ely found no legitimate grounds for its admission.

Copeland Act count was not error. Judges Choy and Ely specifically disagreed. Judge Choy stated this was error because the "Copeland Act provided the single strongest ground upon which the government based its contentions that defendants' architect-developer arrangement was illegal and that the failure to disclose it was false and misleading." As Judge Choy further noted, the "that's illegal portion of Burnett's testimony was the prime piece of evidence of both the illegality of defendants' conduct as well as their knowledge thereof." 563 F.2d at 954.

Nevertheless, Judge Choy held that petitioners could not complain of this error because the trial court had also erred in dismissing the charge. Judge Choy found the court free to determine whether "the defendants in fact received more generous treatment than they deserved

by virtue of the dismissal." 563 F.2d at 954.

Judge Ely, in dissent, emphasized that the prosecutor cited the Copeland Act evidence misleadingly in closing argument. Judge Ely concluded that the trial court's failure to instruct concerning the Copeland Act dismissal made it "entirely conceivable * * * that the conviction eventually rested upon an offense no longer charged." 563 F.2d at 956. He criticized Judge Choy's approach because it would encourage attorneys to ignore trial courts' rulings, as on the dismissal of a charge, "in the hope that an appellate court would hold that the trial court's basic ruling was erroneous and, for that reason, forgive, or hold harmless, the attorney for conduct that would otherwise be prejudicial to the accused and contemptuous of the court." 563 F.2d at 955, n. 1.

REASONS FOR GRANTING THE WRIT

I

The court below, through Judge Choy's concurring opinion, held that the Copeland Act (18 U.S.C. § 874) was broad enough to reach "kickbacks" paid by an architect to the developers of a Federally funded project. Judge Choy held that regardless of the legislative history of the Copeland Act, "the words of the statute are clear in their generality" and had to be read literally:

> "On the face of the Copeland Act there is no indication that Congress intended to limit its reach to the minimum wage context. Nor is there any ambiguity which would compel a resort to the legislative history." 563 F.2d at 954-955.

This holding raises an important question as to the meaning and scope of the Copeland Act and conflicts with the rationale of this Court in decisions construing the Copeland Act (United States v. Carbone, 327 U.S. 633, 637 (1946); United

States v. Laudini, 320 U.S. 543, 544-546 (1944)). It is in direct conflict with a recent decision of the First Circuit Court of Appeals in Slater v. United States, 562 F.2d 58 (1st Cir.1976).

The holding of the court below, based upon a literal reading of the statute, without reference to legislative history, is inconsistent with this Court's holding:

> "[N]ot every person or act falling within the literal sweep of the language of the Kickback Act [Copeland Act] necessarily comes within its intent or purpose. That language must always be read and applied in the light of the evils which gave rise to the statute and the aims which the proponents sought to achieve." United States v. Carbone, supra, at 637.

The Copeland Act, adopted in 1934, was styled an act "to effectuate the purposes of certain statutes concerning rates of pay for labor." Section 1 was codified as 40 U.S.C. § 276b and Section 2 became 40 U.S.C. § 276c. In 1948, 40 U.S.C.

§ 276b was repealed and replaced by an essentially identical statute, 18 U.S.C. § 874, which prohibits inducing kickbacks from:

> "* * * any person employed in the construction, prosecution, completion or repair of any public building, public work, or building or work financed * * * by * * * the United States * * *."

40 U.S.C. § 276c, the other section of the Copeland Act, is a regulatory statute:

> "The Secretary of Labor shall make reasonable regulations for contractors and subcontractors engaged in the construction, prosecution, completion or repair of * * * buildings or works financed * * * by * * * the United States, including a provision that each contractor and subcontractor shall furnish weekly a statement with respect to the wages paid each employee during the preceding week * * *." (Emphasis added.)

These two sections of the Act must be read in pari materia, so that "any person employed," etc., means, here, wage earners in the employment of contractors and subcontractors, whom the Act was intended to protect. See, United States v.

Laudini, supra, at 546-547.

The purpose of the Act was to prohibit kickbacks in order to effectuate minimum wage scales. United States v. Carbone, supra, at 638-639. In Carbone, the proof was that contractors agreed to hire only laborers who would pay union dues. The Copeland Act was ruled inapplicable--though literally encompassing the case--because the situation was not in the class of evils contemplated by Congress. In United States v. Laudini, supra, the Court also based its interpretation of the scope of the Act on the purpose of the legislation. 320 U.S. at 547-548. Cf. United States v. Price, 224 F.2d 604 (6th Cir.1955) ("It is equally obvious both from the legislative history and the Supreme Court decisions, that the scope of the language is not so broad as a literal reading would suggest." 224 F.2d at 607) (Judge Stewart).[6] The inquiry

6. Additional reported cases under the predecessor to 18 U.S.C. § 874 relate only to contractor-laborer factual situations, e.g., United States v. Charlick, 26 F.Supp. 203 (E.D.Pa.1939); United States v. Carbone, 56 F.Supp. 343 (D.C. Mass.1944); United States v. McGraw, 47 F.Supp. 927 (N.D.N.Y.1942). The term "contract of employment," in 18 U.S.C. § 874, has been defined as "the agreement between the contractor and the workman." United States v. Golder, 11 F.Supp. 870 (E.D.Pa. 1935). The only reported cases after recodification as 18 U.S.C. § 874 also involved workmen: United States v. Price, 224 F.2d 604 (6th Cir. 1955); and United States v. Alsup, 219 F.2d 72 (5th Cir.1955), cert. denied, 348 U.S. 982, 75 S.Ct. 572. (Cont.)

here is whether it was only the wage earner employed at physical construction who was the subject of Congressional concern. The apparent purpose of the Act was the enforcement of minimum wages in order to bolster the economy as a whole. Congress (we suggest) did not enact this legislation with a purpose to regulate contracts for the services of professionals who are involved in planning Federal projects and who are not subject to minimum wage regulation. In any event, this case raises an important issue as to the scope and meaning of the Copeland

Act, which should be resolved by this Court.

In Slater v. United States, supra, the First Circuit, in a decision directly in conflict with the holding below, confirmed that a "narrow" interpretation should be given this statute (556 F.2d at 61). The court reversed a conviction based on receipt of payments from an independent contractor.[7] It held essentially that the Copeland Act kickback prohibition applies only to employees who are protected by Federally regulated wage scales.[8]

7. There was conflicting evidence in petitioners' case whether Dahlen was an employee, working for wages denominated as a "draw" under his agreement with petitioners (Deft.Ex.7), or whether he rendered services pursuant to the seven standard owner-architect contracts submitted to HUD, which establish Dahlen as an independent contractor. The Copeland Act charge alleged the latter contracts as Dahlen's "contract of employment"; therefore, Slater is clearly on point. However, Slater does not actually turn on the employee or independent contractor distinction per se, but rather, on the determination that legislative history showed the Act confined to policing of minimum wage scales and not concerned with, inter alia, persons such as independent contractors.

8. We further note that 12 U.S.C. § 1749a, (Cont.)

II

In Finch v. United States, ___U.S. ___, 97 S.Ct. 2909 (1977), the Court held that, after jeopardy attached, a dismissal based on the determination that the defendant cannot be prosecuted for the crime charged concludes the prosecution and retrial is barred by the Double Jeopardy Clause.

Here, the government was in effect granted review of the District Court's dismissal of the Copeland Act charge.[9] In a holding decisive of the outcome of the appeal, Judge Choy found that the trial court's failure to explain the dismissal of the Copeland Act was error, prejudicial to the defense of the fraud

8 (Cont.) which applies to the College Housing Act involved in this case, extends such wage scale protection only to "laborers and mechanics employed by contractors or subcontractors." 12 U.S.C. § 1749a(f).

9. The government made no attempt to appeal under 18 U.S.C. § 3731 and, in its brief below, conceded its inability to do so (Govt.Br., p. 49).

and misstatement charges which were submitted to the jury;[10] but Judge Choy held that this error, which prejudiced petitioners, did not require a reversal of these convictions because the dismissal of the Copeland Act charge was itself an error favoring petitioners:

> "The double jeopardy clause and 18 U.S.C. § 3731 (appeal by United States) may well forbid the Government from appealing the dismissal of the count for purposes of reinstating the indictment as to it. * * * We are free, however, to examine the propriety of the dismissal to determine whether, instead of being prejudiced by an

10. Judge Choy indicated that two distinct errors were each sufficient to require a new trial if the Copeland Act were properly dismissed: (1) the inadequate explanation to the jury of the dismissed charge, to enable the jury to distinguish the significance of testimony concerning a "Copeland Act" and to properly reach an intelligent verdict on remaining charges; and (2) the admission of Burnett's hearsay statement, without a limiting instruction.

No point in the case, justifying affirmance, won the concurrence of two judges. However, while rejecting the rationales proposed by his colleagues, Judges Choy and Duniway each voted to affirm, and each issued an opinion in support of doing so. Under new Ninth Circuit Rule 21, an opinion authorized for publication, as here, may be cited as precedent.

> alleged improper omission from the jury charge, the defendants in fact received more generous treatment than they deserved by virtue of the dismissal and, therefore, now have no cause to complain that an improper dismissal was not clearly explained. Cf. U.S. v. Lemon, 550 F.2d 467,469-70 (9th Cir.1977); U.S. v. King, 552 F.2d 833,849 (9th Cir.1976) cert. denied, 430 U.S. 966 * * * (1977)." 563 F.2d at 954.

The two cases cited as analogous by Judge Choy do not support his stated proposition of law that an appellate court can for any purpose review the dismissal or acquittal of a criminal charge. They deal with invited error or waiver doctrines not involving dismissal of a charge. Here, the prejudicial errors were not a foreseeable component of the request to dismiss the Copeland Act charge; and that conclusion follows from Judge Choy's initial characterization of the jury instruction relative to the dismissal as erroneously incomplete. 563 F.2d at 954.[11]

11. Judge Choy's determination turns on the (Cont.)

Judge Choy agreed with Judge Ely that the unexplained Copeland Act material and the argument based on that evidence prejudiced the jury's consideration of remaining charges. In effect, Judge Choy held it to be harmless error that the jury was permitted to convict petitioners on the mis-impression that it was acting on a Copeland Act charge, because "a properly

11 (Cont.) impression that petitioners won an advantage, and therefore should be estopped to complain of disadvantage which fortuitously arose because of the trial court's erroneous handling of the Copeland Act dismissal. Yet the prosecution had a one-sided advantage in using the Copeland Act evidence while petitioners' counsel was restrained from countering its impact. Therefore, the trial court's tardy grant of petitioners' motion, coupled with erroneous instructions upon it, was fatal to the defense--not advantageous to it in any way. Had the Copeland Act remained in the case, the defense could be unrestrained in distinguishing proof upon it from other charges and would have had notice of the necessity of entering a defense on the Copeland Act charge during the presentation of its case. Had the court granted the motion before trial, when the defense first moved for dismissal, the government could have appealed or not appealed. If the latter, surely it could not later have argued that the charge was improperly dismissed. If it had appealed and won, the defense would have had the benefit of full notice of the charges and a right to adequate instruction of the jury, allowing the jury to judge each charge separately.

instructed jury" might have found guilt on the Copeland Act charge. 563 F.2d at 954. Therefore, petitioners were, after all, subjected to criminal penalties based on the reviewing court's determination of Copeland Act liability.

The writ should be granted to determine whether the Double Jeopardy Clause forecloses appeal of such a dismissal order for any purpose to impose or affirm criminal penalties. That question is now the primary unanswered component of the body of recent Double Jeopardy Clause cases developed in Serfass v. United States, 420 U.S. 377 (1975); United States v. Wilson, 420 U.S. 332 (1975); Finch v. United States, supra; and related cases.

Conflict in principle with the Court's previous decisions accentuates the desirability of review. The fundamental cases construing the Double Jeopardy Clause establish that "the protection is not, * * *

against the peril of a second punishment, but against being again tried for the same offense." United States v. Ball, 163 U.S. 662 (1896). Review of the merits of an acquittal, even in an appellate court, constitutes double jeopardy. Kepner v. United States, 195 U.S. 100 (1903). The Finch case equates a dismissal after jeopardy has attached with acquittal, if the dismissal is based on the determination that the defendant may not be convicted for the offense charged.

This case is analogous to Price v. Georgia, 398 U.S. 330 (1970), which teaches that merely the renewed accusation of crime offends the Constitution, where it may adversely affect the defendant. In Price, the defendant on a murder charge, convicted of manslaughter, was reindicted for first degree murder upon remand after reversal of his conviction. The second jury also failed to convict of first

degree murder. This Court found the mere possible influence of that charge upon a remaining manslaughter charge constituted a forbidden burden and was not merely harmless error. 398 U.S. at 331.

The Court should grant the writ and hold that the same principles apply to any judicial review of the merits of a dismissal order which constitutes a bar for double jeopardy purposes.

The result here implicates other constitutional principles. No action of petitioners waived jury trial on the factual allegations supporting the dismissed charge.[12] Nevertheless, Judge Choy holds that possible guilt, of a charge which can now never be determined on its merits, justifies a faulty conviction on other, distinct charges. To justify criminal sanctions based on an accusation untested

12. The motion for dismissal on legal grounds does not in itself waive a demand for jury trial on factual issues. Serfass v. U.S., supra, at 389.

by a full trial, and which petitioners had no opportunity to refute, violates the assurances of the Fifth and Sixth Amendments as to that charge. Furthermore, the result in the court below may be viewed as a relaxation of the presumption of innocence, reiterated by this Court in Estelle v. Williams, 425 U.S. 501, 503-505 (1976). If the petitioners are in fact presumed innocent of Copeland Act charges until a jury finds otherwise, the determination that the charge might have been properly submitted to the jury would hardly seem adequate to excuse an improperly obtained conviction on charges that were submitted to the jury.

As a separate consideration, the Court should grant the writ in the exercise of its supervisory power. The outcome of the case, based on Judge Choy's rationale, encourages prosecutors to dis-

regard the trial court's authority in hopes of securing review and retrospective sanction for continued comment on a dismissed charge. Accordingly, Judge Ely criticized the Choy opinion as "contrary to the most basic traditional concept of an orderly trial." 563 F.2d at 955, n. 1.

III

This Court is asked to determine whether a trial court must inform the jury about the dismissal of a charge initially read to the jury and about which there has been important testimony. The holding of the Ninth Circuit, per Judge Duniway, is that the trial court need not do so. The issue merits the Court's attention because it presents a recurrent problem in trial courts, with constitutional overtones; yet the case law is in confusion on articulated standards. The result here is counter to recognition by other

Circuits of a duty to protect the verdict from the influence of a charge which should not have been brought.

Confusion in the jury's apprehension of the charges submitted to it compromises constitutional rights of due process. If the jury is uncertain of the grounds upon which it may convict, then the defendant must be uncertain of the charge against which he must defend. The defendant may be convicted of a crime not charged, as Judge Ely felt may well have happened in this case.[13]

13. Judge Skopil instructed the jury as to the elements of the charges submitted to the jury. The abstract form of these instructions and the difficulty of the concepts involved, particularly in regard to conspiracy and fraud on the government (18 U.S.C. § 371), might have left the jury with insufficient guidance. The charge on conspiracy to defraud the government might lead the jury to convict, based on a belief that the defendants violated the Copeland Act, even had they followed Judge Skopil's instructions precisely:

"Thus, in order for you to find the defendants guilty of Count I of the indictment, if you find that the defendants formed an agreement as described, you must then find that the object of that agreement was at least one of the following:

* * * (Cont.)

The constitutional shoal presented parallels the problem of joinder of defendants, where the confusion of evidence admissible against a co-defendant brings pressure on the right to a separate determination of guilt. Just as that issue has been addressed by this Court in, e.g., Bruton v. United States, 391 U.S. 123 (1968), the frequently encountered question raised here should also be resolved.

13 (Cont.) "3. To defraud the Department of Housing and Urban Development of its right to have its program for student housing construction under the College Housing Act of 1950 be administered, implemented, and operated honestly, fairly, and free from deceit, trickery, and dishonesty." R. 1087.

In accordance with the court's order dismissing the Copeland Act kickback charge, all allegations referring to "kickbacks" were removed from the indictment given the jury at the close of the trial (R.925).

However, in argument, the prosecution at one point suggested an equation between kickbacks and "deceit" or "trickery" (R.987-988). Moreover, as Judge Ely observed, continued reference to the Copeland Act after Judge Skopil stated that he had removed certain matters from the case suggested that violation of that Act was still within the issues before the jury. 563 F.2d at 956.

In the Opinion of the Court, below, Judge Duniway holds that there was no error in instructions to the jury because no instructions given by the court were in themselves erroneous. 563 F.2d at 909. This limited view of the court's responsibility is discordant with this Court's dictum that even correct but "equivocal" instructions are insufficient on important points of law. Bollenbach v. United States, 326 U.S. 607, 613 (1947). In Bollenbach, the Court of Appeals had held the trial court erred in charging the jury that possession of stolen bonds raised a presumption of transport of the bonds interstate; but the Court of Appeals affirmed on the theory that the jury must have found that the defendant was at least an accessory after the fact. Having rejected that justification as obviously inadequate, the Supreme Court addressed the government's second

argument: that the instruction could be construed in such a way as to be appropriate for the offense charged. The Court did not agree that the instruction could be construed so as to be accurate; however, Justice Frankfurter's comment on this argument is pertinent to the present case:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue. And a charge deemed erroneous by three circuit judges of long experience and who have a sturdy view of criminal justice is certainly not better than equivocal."
> 326 U.S. at 613.

This Court should reaffirm this position and hold that a charge, which two circuit judges held misleadingly incomplete, was "not better than equivocal" and was insufficient to protect basic rights.

As a further reason for granting the writ, the Court may consider the conflict in principle between the holding here and measures other Circuits have

held necessary to guard against the prejudicial influence of a dismissed charge. In United States v. Wolfson, 437 F.2d 862 (2d Cir.1970), the Second Circuit found it reversible error that a jury was not, until the end of trial, given instruction against considering charges which were dismissed at the close of the government's case and which involved proof of legal transactions with "sinister implications." Similarly, in United States v. Jackson, 418 F.2d 786 (6th Cir.1969), the Sixth Circuit held that reversal was necessary where there was a possibility the trial court's instructions were insufficient to prevent jury consideration of inadmissible evidence on a dismissed charge.

In United States v. Dreyfus, 528 F.2d 1064 (5th Cir.1976), the Fifth Circuit held as a matter of law that the splitting of architectural fees with a developer of HUD financed projects does not violate

18 U.S.C. § 1010 as misrepresentation of architectural costs. Because of tne prejudicial implications of testimony on that charge, the Court of Appeals reversed the conviction of other charges which were tried at the same time. The court emphasized the particular danger of unfair prejudice because the crucial issue in the case was illegal purpose, and the trial involved "complex business transactions and subtle points of law." The court stated:

> "When an appellate court rules that certain counts should never have been put before a jury, it must not be unmindful of the potential for confusion in the minds of the jurors." 528 F.2d at 1071-1072.

In Jackson and Wolfson, the jury was given specific instruction to disregard the dismissed charge and evidence on it; yet, because of the possibility of prejudice, even such a charge was held insufficient. Here, petitioners

were denied even an instruction intelligibly communicating that petitioners were not guilty of violating the Copeland Act. In Jackson, Wolfson and Dreyfus, the courts stated that evidence on the deleted charges was inadmissible on the remaining charges. Here, Judge Duniway holds that no separable piece of evidence could be determined as utterly irrelevant to the remaining charges; however, this does not confront the fundamental criticism lodged by Judge Ely: "It is entirely conceivable * * * that the conviction eventually rested upon an offense no longer charged." 563 F.2d at 956.[14] The result here is in marked contrast, if not direct conflict, with the results reached by the Second, Fifth

14. Moreover, as Judge Choy expressly noted, at least the Burnett testimony containing an accusation of illegality under the Copeland Act manifestly would have demanded a limiting instruction but for the inclusion of the Copeland Act charge. 563 F.2d at 954, n. 7.

and Sixth Circuits.

CONCLUSION

For the reasons stated, this writ should be granted and the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

NORMAN SEPENUK

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Of Attorneys for Petitioners

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v

PHILIP A. McLENNAN AND FRED H.
BENDER, Defendants-Appellants.

No. 76-2365

Oct. 19, 1977

[563 F.2d 943 (1977)]

Appeal from the United States District Court for the District of Oregon

Before: DUNIWAY, ELY and CHOY,
Circuit Judges

DUNIWAY, Circuit Judge:

Defendants McLennan and Bender appeal from judgments convicting them of (1) making false statements in a matter within the jurisdiction of a department or agency of the United States, (2) making false statements for the purpose of influencing the action of the Department of Housing and Urban Development (HUD), and

(3) conspiring to make such false statements and to defraud the United States, all in violation of 18 U.S.C. §§ 371, 1001, and 1010 (1970). We affirm.

FACTS

During the years 1971 through 1975, defendants, through two non-profit corporations, applied for loans from HUD under the College Housing Act of 1950, 12 U.S.C. §§ 1749 et seq. (1970), for the purpose of designing and constructing seven college dormitory facilities in four states. The Act provided for loans covering "project costs" incurred by a borrower and concurred in by HUD and prohibited profit-making by a borrower. Architectural costs were limited to those actually "necessary" for the construction of the particular project being funded.

From October, 1971, to April, 1975, the defendants received a total of $961,282 from HUD, which they repeatedly

represented in loan applications, through owner-architect agreements, in fund requisitions and in final project costs decertifications, as being paid or payable to the project architect, Charles Dahlen. In reality, Dahlen was not an independent contractor as HUD was led to believe, but rather a salaried employee of the defendants. After paying Dahlen's salary and expenses, the defendants divided the remainder of the money received from HUD for architect's fees, roughly $600,000, between them. These criminal charges resulted from their false statements that this money was to pay or was paid to the architect. Defendants' primary defense was that they acted in good faith, thus lacking the specific intent required to violate the applicable statutes. As part of that theory, they claimed that at all times they had acted on the advice of their counsel and accountants.

On this appeal, the defendants raised two issues:[1] (1) whether certain testimony was inadmissible hearsay and irrelevant; and (2) whether the district court erred in its instruction to the jury concerning the dismissal of part of the indictment.

I. The Alleged Hearsay Statement.

Defendants challenge the admission of certain testimony of their former attorney on the grounds that it was (1) inadmissible hearsay, and (2) irrelevant.[2]

The defendants' former attorney, Burnett, testified about the advice which he had given them. The statement made by Burnett, which is now being challenged, was elicited in the following exchange on

1. Three issues were originally raised in this appeal. However, at oral argument on January 12, 1977, the defendants' attorney "waived for all purposes" the issue challenging the instruction given on "motive" and "intent." Therefore, we will only deal with the two remaining issues.

2. Defendants waived the attorney-client privilege to allow their former attorney to testify.

direct examination by the government.

> Q. Now, were you aware, in 1971, that funds were being paid from an account in the name of Charles Dahlen to Mr. Bender and Mr. McLennan?
>
> A. No.
>
> Q. Were you aware of that in 1972?
>
> A. No.
>
> Q. Did you become aware of that in 1973?
>
> A. In late 1973, yes.
>
> * * * *
>
> Q. When you did learn from Mr. Bender about these transfers, do you specifically recall what it was that you said to him?
>
> A. Yes.
>
> Q. And what was it?
>
> A. "For Christ's sake, I told you that was illegal." (Reporter's Transcript 407, 409)

Defendants claimed that their good faith reliance upon the advice of counsel negated the fraudulent intent that was an essential element of the charge. Advice of counsel is no defense unless the

defendant gave his attorney all of the facts, and unless counsel specifically advised the course of conduct taken by the defendant. Bisno v. United States, 9 Cir., 1971, 299 F.2d 711, 719-20, cert. denied, 1962, 370 U.S. 952.

Under these rules, the questions and answers about Burnett's awareness of the facts in 1971, 1972, and 1973 were clearly relevant. Moreover, because Burnett was speaking of what he knew, and when, his answers were not hearsay. Defendants do not disagree.

They concentrate their fire on the last answer quoted above. It was clearly relevant and damaging to their defense of good faith reliance upon their attorney's advice. The issue is whether it was admissible. Judge Skopil in his order denying the defendants' motion for a new trial concluded that the statement was not hearsay because it was offered to prove some-

thing other than the truth of what was said, Fed. R. Evid. 801(c), and therefore was admissible. He was right.

In late 1973, defendants' auditors raised questions about what defendants had done and were doing with the moneys that, according to defendants' certifications to HUD, were to go to the architect. One of the defendants thereupon called in Burnett, and the incident that is quoted resulted. At that time, moneys were still to be received from HUD, and thereafter the defendants again certified to HUD that a named percentage of the moneys claimed were to go to the architect. Two of the counts in the indictment, Counts VII and VIII, relate to those false certifications.

The exclamation was not a mere assertion by the attorney that he had told the defendants something in the past. In the circumstances in which it

was made, the attorney having been called in for advice, and one of the defendants having just told him what they were doing, the statement would clearly tell the defendants: "I'm telling you now that is illegal," or so a jury could find. The reference to the previous advice, and the attorney's obvious surprise and dismay strongly reinforce his opinion, making his statement even stronger than if he had merely said, "That is illegal." The statement was relevant as present notice; it was not merely an assertion of past notice to the defendants.

Moreover, the statement was not offered or admitted to prove the truth of what Burnett said--that defendants' actions were illegal or that in the past he had told them "That is illegal"--but simply to show that the statement concerning illegality had been made. When the defense is advice of counsel, the

advice given, whether correct or not, and whether recitals in it are true or not, is always admissible. Usually the defense of advice of counsel is raised where the conduct involved is illegal. Thus, almost by definition the advice relied upon will have been erroneous but given and relied upon in good faith. The words spoken are the advice given. Advice is customarily given in words, and when advice is the question, the words which constitute the advice are classic examples of verbal acts, admissible because they were spoken, whether true or false. Such verbal acts are not hearsay. They come in to bring home notice to the defendant in a case like this. United States v. Kutas, 9 Cir., 1976, 542 F.2d 527, 528. See also Phillips v. United States, 9 Cir., 1965, 356 F.2d 297, 301, cert. denied, sub nom. Walker v. United States, 1966, 384 U.S. 952. Thus, if

the attorney had added: "I told them that I had discussed this with several attorneys expert in these matters, and that they all agreed with me that that is illegal," that too would be admissible, whether or not the witness' statement of what he had done and what he had been told was true. It would still be a statement by the attorney of the advice he had given.

United States v. Freeman, 9 Cir., 1975, 519 F.2d 67, also supports this conclusion. In that case, Freeman was appealing her conviction for "bail jumping" which was based upon her failure to appear in district court on a specific date. A major issue in the district court was whether she knew that she had been ordered to appear on that date. Her attorney was asked, under oath, whether he had previously stated to the court that he had told his client when she was

scheduled to appear. We said:

> Counsel was not asked whether he had advised appellant of the order that she appear on May 20th; instead, he was asked whether, on that date, he had stated to the court that he had done so. An affirmative response to the former question, insofar as it constituted evidence of utterances and writing offered to show the effect on the hearer or reader, would not have been subject to attack as hearsay. See, e.g., McCormick, Evidence § 249 (2d ed. 1972)
> 519 F.2d at 69.

In Freeman, the statement was not elicited to show its effect upon the court but rather to show that Freeman knew the date of the court appearance. The statement was relevant only if it showed that the attorney did tell Freeman, his client, when to appear. At issue was the very truth of the matter asserted. Here, the statement was offered to show its effect upon the defendants. Here, it is the fact that the statement was made, not its truth, that is relevant and material. That is pre-

cisely the distinction recognized by the court in Freeman, supra. Our case is like the case that would have been before the court in Freeman if in that case "[c]ounsel was . . . asked whether he had advised appellant of the order that she appear on May 20th. . . . An affirmative response to [that] question . . . would not have been subject to attach as hearsay."

Moreover, the fact that the statement was made was also compelling evidence that before November, 1973, Burnett was not aware that the defendants had been personally appropriating the architect's fees. It shows the attorney's lack of knowledge about the defendants' activities. From this the jury could conclude that the defendants had not fully informed their lawyer of all the material facts when they were soliciting his advice, thus undermining their

defense of reliance on the advice of counsel. Williamson v. United States, 1908, 207 U.S. 425, 453; Bisno, supra, at 720. Because Burnett's testimony was offered to show both defendants' and Burnett's knowledge, it was not hearsay, and its admission was proper.[3/]

The defendants also argue that even if the statement was admissible to show intent, the court should have instructed the jury that it was not to be considered for the truth of the matter stated. Defense counsel, although objecting to the answer and moving for a new trial, never asked that the court

3. Burnett had advised McLennan and Bender how to avoid violating the Copeland Act (a charge which was dismissed from the case, see, infra, Part II). His testimony, and in particular, the statement being challenged here, was referring to his advice regarding that Act. Because the evidence was not being admitted to prove that McLennan and Bender were, indeed, violating the Copeland Act, but merely to show what advice their attorney had given them, the dismissal of the Copeland Act charge did not affect the admissibility of that statement.

give such a limiting instruction. Fed. R. Evid. 105. He argues now that such a request would have been "futile" because the trial court had ruled that the statement was not hearsay. We fail to see the "futility" of such a motion. The court had said nothing about a limiting instruction because he had not been asked to give one. Nothing prevented counsel from making such a request. In the usual case, the court is not required to give such an instruction sua sponte. Benson v. United States, 9 Cir., 1968, 402 F.2d 576, 581. The law places upon counsel the duty to ask for it. Sica v. United States, 9 Cir.1963, 325 F.2d 831, 836, cert. denied, 1964, 376 U.S. 952. See United States v. Campbell, 9 Cir., 1972, 466 F.2d 529, 531, cert. denied, 1972, 409 U.S. 1062; Petley v. United States, 9 Cir., 1970, 427 F.2d 1101, 1106, cert. denied, 1970, 400 U.S. 827.

In this case, Burnett was subject to cross-examination and, indeed, at the end of his testimony specifically asked for and received permission to explain the context in which the statement was made. (Reporter's Transcript at 430-432.) While a limiting instruction could have been given if requested, we cannot find that its omission was plain error. F. R. Crim. P. 52(b).

Finally, the trial judge had broad discretion to determine relevance. United States v. Salazar-Gaeta, 9 Cir., 1971, 447 F.2d 468. There was no abuse of that discretion in this case. The statement was clearly relevant.

It is suggested that the witness' answer could be admitted as an excited utterance. This seems doubtful on the record before us. According to McCormick, there are two conditions precedent to the admission of a hearsay statement un-

der the "excited utterance" exception: "First, there must be some occurrence or event sufficiently startling to render normal reflective thought processes inoperative. Second, the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought." McCormick on Evidence § 297, 2d Ed. p. 704. Thus, when a hearsay statement is offered under this exception, the trial court must make a preliminary factual determination that the declarant was so excited or distraught at the moment of utterance that he did not reflect (or have an opportunity to reflect) on what he was saying. Judge Skopil made no such determination here. The record is hardly sufficient for us to do so. Moreover, as McCormick notes, "Most courts . . . would probably be extremely skeptical regarding whether

one merely informed of an event could become so excited upon hearing of it as to lose the power of reflective thought." Id. at p. 705.

It is also suggested that Freeman was wrongly decided, because self-quoting is not hearsay. But this panel cannot overrule Freeman. Only the court in banc can do that. This case is not a good vehicle for that purpose. Freeman itself recognizes a distinction under which, as has been shown, the testimony here in question was admissible.

II. Alleged Error in Jury Instructions.

Count I of the indictment originally contained a portion alleging a violation of the Copeland Act, 18 U.S.C. § 874 (1970).[4/] The indictment did not

4. 18 U.S.C. § 874 (1970) states:
"Whoever, by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever induces any person employed in the construction, prosecution, completion or repair of any public building, public work, or building or work financed in whole (Cont.)

mention the Copeland Act by name. It merely cited § 874. The defense moved to dismiss that part on the ground that the Copeland Act did not apply to the facts alleged by the government. Initially, the trial judge denied the motion and thus, during the presentation of the government's case, there were some references by witnesses and counsel to the Copeland Act. In addition, the indictment which was read to the jury at the beginning of the trial also contained the Copeland Act charge, although the name of the Act was not mentioned.[5/]

4. (Cont.) or in part by loans or grants from the United States, to give any part of the compensation to which he is entitled under his contract of employment, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

5. The part of the original indictment which referred to the provisions of the Copeland Act stated:
"c. The defendants, by deception and by other means and in other manners, did induce Charles R. Dahlen, a person employed in the construction, prosecution, completion or repair of building or work financed in whole or in (Cont.)

At the close of the government's case, defense counsel again moved to dismiss that portion of the case, and at that time, the motion was granted, and the trial judge dismissed that portion of the conspiracy count (Count I ¶ 2. c.) which contained the Copeland Act charge.

At defense counsel's request, the judge stated that he would inform the jury about the dismissal of that part of the indictment, and he warned defense counsel that the dismissal was not to be used as a weapon in closing argument. Immediately before final arguments, the court instructed the jury that it had "taken a portion of Count I away from the jury's consideration . . . purely

5. (Cont.) part by loans or grants from the United States, namely student housing construction under the College Housing Act of 1950, to give up part of the compensation to which he was entitled under his contract of employment as set forth in Owner-Architect Agreements; in violation of Title 18, United States Code, Section 874." (Clerk's Transcript at 3-4)

as a matter of law, and [it] has nothing to do with the factual determination which you are to make on the other counts" (Reporter's Transcript at 937-938). No mention was made by the court that the dismissed portion of the indictment concerned the Copeland Act, or that it referred to "kickbacks."

McLennan and Bender contend that the court's explanation of the dismissal of those charges was inadequate because it did not inform the jury of the substance of the deleted charge to help the jury sift out the irrelevant evidence. The argument is a red herring. The fact is that all of the evidence which was admitted was relevant under the charges that remained in the case. There was no evidence that was relevant only to the Copeland Act charge. Indeed, defense counsel at oral argument was unable to point to any evi-

dence presented which was relevant solely to the Copeland Act allegation. Thus the type of instructions to the jury that defendants now mention were unnecessary. Defendants do not claim either (a) that the court gave any instructions that would be appropriate only to the Copeland Act, thus permitting the jury to convict under that Act, or (b) that any of the instructions that the court did give, relating to the charges that remained before the jury, were errnoeous. How, then, could the defendants be prejudiced?

Defense counsel argues that the problem was not irrelevant evidence but rather that references to the "Copeland Act" implied to the jury that an ongoing relationship of this type between the developers and the architect was per se illegal. The thrust of this argument takes us back

to Burnett's statement discussed in the first part of this opinion. Defense counsel is contending that the jury considered the statement as true and as an indication that the defendants' actions were illegal under the Copeland Act. He alsó argues that the court failed to explain to the jury that (1) the Copeland Act was no longer a part of the case and (2) because the trial court had determined that the Act did not apply to this type of relationship, the defendants' activities did not violate it. That omitted explanation, counsel argues, left the unwarranted and prejudicial implication of illegality before the jury. This, too, is a red herring.

The prosecutor's opening argument covers 50 pages of the transcript. Never once did he argue the substantive offense proscribed by the Copeland Act.

Never once did he argue that what defendants did violated the Copeland Act. His entire argument was directed to the remaining charges--false statements to the government that enabled the defendants to get from the government over $600,000 to which they were not entitled. The Copeland Act deals with "kickbacks" and would apply only if the defendants had required the architect to pay to them money that he had received from the government. The prosecutor never argued that that is what happened. The court gave no instructions on that subject.

In opening his argument, the prosecutor mentioned the Copeland Act only once, in reference to attorney Burnett's testimony that he told the defendants that an arrangement whereby the architect would be on salary, doing the work for less money than they told the

government it cost, couldn't work and would be illegal because of the Copeland Act. Defense counsel did not object then or at any time. The argument was legitimate because Burnett did mention the Copeland Act, and the defendants went ahead in spite of his advice. But the prosecutor did not suggest that defendants could be convicted under the Copeland Act.

In his closing argument, defense counsel mentioned the Copeland Act twice. Once, he referred to a contract that was in evidence, and here is what he said:

> Well, ladies and gentlemen, I would, of course, suggest to you that you do read it and I would like to put this agreement in context, too. This agreement was drawn by Mr. Burnett. It was drawn, in part, to avoid Copeland Act problems and, incidentally, ladies and gentlemen, the Copeland Act is no longer part of the case. That is one of the charges that are no longer before you. It is not a part of this case, but it was drawn in part to avoid the so-called Copeland

Act problem, anti-kickback problem, so to speak. [R. T. 998]

The second time what he said, referring to Burnett's testimony, was this:

I said to him:

* * * *

Q. Now, in setting up these entities, I take it you were concerned with making sure that the defendants didn't do anything improper?

A. Certainly.

Q. Or run afoul of the law?

A. Certainly.

Q. Especially the so-called Copeland Act?

And as I mentioned, that Copeland Act is not part of this case. And there was a problem with the Copeland Act and he was trying to implement the total developmental entity approach just for this dream of Mr. McLennan's. [R. T. 1046-47]

Thereafter, the Copeland Act was not mentioned again by anyone, including the prosecutor in his closing argument.

As the case was finally submitted

to the jury, it was based entirely upon these contentions: The defendants employed an architect, Dahlen, upon a monthly salary plus expenses, which together totalled approximately $300,000. However, on various documents submitted to HUD, they repeatedly represented that the architect was entitled to either a percentage of cost or named sums of money totalling approximately $900,000. They covered up the fraud by setting up a "revenue" account in Dahlen's name, on which they could draw but on which he had no right to draw, and into which they put the moneys that they had received for architect's costs. From this account, they paid to the architect his $300,000, and they paid to themselves $600,000. It was a sophisticated and highly successful fraud. And they concealed it from their attorney as well as from the government. The case

was proved to the hilt. It was not a close case.

It is not correct to say that most of the government's evidence related to the Copeland Act charge. It is not correct to say that that Act provided the strongest single ground for the charge that defendants' arrangement with the architect was illegal, and that concealing it was false or misleading. It is not correct to say that Burnett's dismayed statement was the strongest evidence of illegality and of defendants' knowledge. In fact, the Copeland Act charge was a minor part of the case. The Act is referred to only in the conspiracy count, Count I, and then only in the portion quoted in footnote 5, supra, a subparagraph of 7 lines in a count of 14 pages that stated in detail just what the defendants had done. None of the remaining counts refers to

the Copeland Act. Counts I through V refer to 18 U.S.C. § 1010--false statements to HUD. Counts VII and VIII refer to 18 U.S.C. § 1001, the general false statement section.

It is apparent that the Copeland Act language in the indictment was a protective charge, one intended to forestall a defense that the deposit of money in the Dahlen revenue account was in fact a payment to Dahlen, who could then do with it as he pleased, so that payments to defendants from that account were by Dahlen to them, instead of a coverup for their simply keeping the money. The evidence, however, is that Dahlen never got the money in the first place, although the defendants represented to the government that he was to get it. That is the gist of the charge; that is the theme of the indictment; that was the theme of the prose-

cutor's argument; that is what this case is really about.

The court was never asked by the defense to instruct the jury "comprehensively" or "in detail" about the dismissal of the Copeland Act reference in Count I. Defense counsel never suggested any particular or specific language on the subject. Before the case was argued to the jury, the court instructed them as follows:

> There is one matter that I do desire to take up with you prior to the time that they start their argument, and as a matter of law, the Court has taken certain portions of the indictment away from the jury's consideration and those matters will not be considered by you.
>
> As you recall, this was an eight-count indictment. It was read to you at the start. Mrs. Hui read it to you. I, as a matter of law, have taken Count VIII away from the jury's consideration. That is a matter of law that the Court had to determine. It's no concern to you, as far as the facts are concerned, with reference to the remaining counts.

> So I wanted to advise you of that in view of the fact that those matters are not now before the jury, you might have wondered why the attorneys were not talking about those matters, but they have been taken away from you, purely as a matter of law, and has nothing to do with the factual determination which you are to make on the other counts. [R.T. 937-38]

Defense counsel did not object.

When the prosecutor's opening argument is considered in its entirety, the one reference to the Copeland Act was properly used to support the general theory that the defendants did not, in good faith, follow their attorney's advice, and it was a minor part of the argument. As I have already indicated, the statement was admissible for that purpose, and the burden of asking for a limiting instruction which would have alleviated this "problem," of which counsel now makes so much, rested with the defense.

Even assuming that the jury might have drawn an improper conclusion from the reference to the Copeland Act, the problem was eliminated by the trial court's instructions. Judge Skopil told the jury only what it must find to convict under the charges remaining in the indictment. At no point was the jury told what findings would justify a conviction under the Copeland Act. All that the jurors knew about the applicable law was what the trial judge clearly and correctly explained to them. To those instructions there was no objection. In addition, a copy of the indictment, with all references to the dismissed charges deleted was given to the jury. There was no objection. There was no possible prejudice.

Under the circumstances, it is unnecessary to consider whether the charge under the Copeland Act was improperly

dismissed.

Affirmed.

CHOY, Circuit Judge, concurring specially:

I agree that the convictions of McLennan and Bender should be affirmed. I would reach that result, however, for reasons different from those advanced by Judge Duniway.

Hearsay

I am unpersuaded by Brother Duniway's attempt to distinguish the controlling precedent of United States v. Freeman, 519 F.2d 67 (9th Cir.1975). Here, as there, the involved statements contained the words "I told" (or "stated" or "advised"), and thus at least that portion of the declarant-witness' out-of-court utterance cannot be said to have been offered merely for the nonhearsay purpose of proving notice, for previous notice in this context is the very truth

of the matter asserted: that the statement was in fact previously uttered.[1/]

On the assumption that Freeman was cor-

1. Judge Duniway's misreading of Freeman may stem from the focus of its attention in that opinion. He quotes the following language:

> Counsel was not asked whether he had advised appellant of the order that she appear on May 20th; instead, he was asked whether, on that date, he had stated to the court that he had done so. An affirmative response to the former question, insofar as it constituted evidence of utterances and writings offered to show the effect on the hearer or reader, would not have been subject to attack as hearsay. See, e.g., McCormick, Evidence § 249 (2d ed. 1972).

519 F.2d at 69. He overlooks, however, the very next sentence:

> But an affirmative response to the latter inquiry-the response here given-was clearly evidence of out-of-court statements offered to prove the truth of the matters asserted therein.

Id. (footnote omitted).

It is possible that the result in Freeman may reflect a desire to limit evidence of a witness' effort to buttress his statement with testimony that he had repeated it before. If so, whether Ms. Freeman's attorney stated what he did to the court in the bail-jumping proceeding may well have been irrelevant, and possibly should have been excluded on that basis. But that objection is clearly not one based on hearsay principles. The hearsay problem would arise only when, and if, third parties to whom the declarant had spoken were called to corroborate his testimony.

rectly decided, therefore, Burnett's testimony in the instant case was hearsay. Even as such, however, I would hold that it is admissible under the excited utterance exception, Fed.R.Evid. 803(2). See United States v. Bell, 351 F.2d 868, 872-73 (6th Cir.1965), cert. denied, 383 F.2d 947 (1966)(decided prior to the effective date of the Federal Rules of Evidence).

More fundamentally, however, upon reflection I now question the validity of the holding in Freeman that a declarant-witness' self-quoting is in fact hearsay.[2/] Although commentators maintain that, as a general principle, under the "orthodox approach," such self-quotation is technically hearsay if offered for the truth of its contents, see 4 J. Weinstein &

2. The Freeman court went even further in that it apparently found some statements to have been hearsay by adoption, for the witness' testimony in one instance consisted only of the answer "yes" to the prosecutor's question.

M. Berger, Weinstein's Evidence ¶ 801(d)-(1)[01], at 801-64 to -65 (1975) [hereafter cited as Weinstein] and authorities cited therein, I have found no case other than Freeman which so holds, and Freeman itself cited none. The reason for this precedential void may be that characterization of declarant-witness self-quoting as hearsay--and its resultant exclusion on that basis--usually may be avoided by offering the statement not to prove the truth of the matter asserted therein, but rather to prove notice or knowledge on the part of someone alleged to have heard (or read) the statement. Because of the "I told" component of the statements in Freeman, however, such treatment was unavailable, and the evidence there was held to be hearsay.[3/] I believe that, if the holding

3. Judge Duniway characterizes Burnett's self-quote as a "classic exampl[e]" of a verbal act, which is not, in turn, hearsay, citing United (Cont.)

in Freeman was correct on this issue, it compels the same result here.

I would reject the assumption in Freeman and do away with its rule that makes declarant-witness self-quoting hearsay (1) because it is so rarely encountered (possibly only in the context of "I told" or equivalent statements), (2) because the problem is so easily avoidable by a properly framed question which elicits identical information, and

3. (Cont.) States v. Kutas, 542 F.2d 527, 528 (9th Cir.1976), and Phillips v. United States, 356 F.2d 297, 301 (9th Cir.1965), cert. denied sub nom. Walker v. United States, 384 U.S. 952 (1966). I have difficulty with this analysis. The hearsay issues in the cited cases are resolved not by the verbal act exception to the hearsay rule. See Kutas, 542 F.2d at 528 ("[t]he documents in question were received . . . for the jury's consideration in determining whether one or more of the defendants knew . . . ."). While application of the verbal act concept is less than uniform, see generally 4 Weinstein at 801-59 to -60, it is at least questionable whether the cited authorities render it apposite here. Moreover, resort to verbal act analysis obscures the fact that notice is clearly at issue here, and that the notice exception is unavailable where the truth of the "I told" component of the statement is the truth of the matter asserted.

(3) because, in any event, the rule is without foundation either in logic[4] or the policy considerations which underlie the hearsay safeguards, for the declarant-witness is present at trial, under oath, subject to cross-examination, and he affirms the statement as his.[5] See

4. An absurd result obtains: A witness can, without any possible hearsay objection, relate what he has seen, yet he cannot relate what his memory tells him his own mouth said. It is as if one's eyes' sensory input to the brain is admissible, but testimony as to one's mouth's sensory input to the brain is forbidden.

5. Such is apparently also the understanding of the federal Advisory Committee on Proposed Rules as expressed in a somewhat ambiguous commentary to Rule 801, which became effective after the trial in Freeman:

> Considerable controversy has attended the question whether a prior out-of-court statement by a person now available for cross-examination concerning it, under oath and in the presence of the trier of fact, should be classed as hearsay. If the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem. The hearsay problem arises when the witness on the stand denies having made the statement or admits having made it but denies its truth.

Fed.R.Evid. 801(d)(1), Note (prior statement by witness)(emphasis added). Later in the same Note, however, the Committee cuts back on the expansive (Cont.)

generally McCormick on Evidence § 245 (2d ed. Cleary 1972). I would hold that, in all cases, declarant-witnesses self-quoting is not hearsay, or that, if it is technically hearsay under the definition of Federal Rule of Evidence 801(c), it should be admitted pursuant to the "federal common law" hearsay exception provisions of Rule 803(24)

5. (Cont.) thrust of the foregoing language, and it seems to limit the admission of a witness' prior statement as substantive evidence to the two contexts of present Rule 801(d)(1)(A) and (B)--prior inconsistent statements given under oath, and prior consistent statements offered to rebut a charge of recent fabrication or improper motive--and not to differentiate between whether a third party is testifying as to what the then-present declarant had said or whether the declarant himself is testifying as to what he said.

The Note and commentators suggest that the reluctance to permit the admission of prior out-of-court statements of a witness notwithstanding his present availability for cross-examination under oath grew from a fear that such a rule would lead to trial by fraudulently prepared deposition testimony. See, e.g., 4 Weinstein at 801-68 to -69. Such an apprehension, however, goes more to condemning the ethics of the federal bar than to violations of the policies underlying the hearsay protections. Compare note 1 supra.

owing to its independent indicia of reliability and to serve the "interests of justice."[6/] See 4 Weinstein at 803-250.

The Copeland Act Count

I also cannot agree with Judge Duniway's conclusion that the failure of the trial court to instruct the jury in detail about the dismissal of the Copeland Act count was not error. Clearly,

6. Rule 803(24) provides that the following is not excluded as hearsay:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

most of the evidence offered by the Government related to this count. The Copeland Act provided the single strongest ground upon which the Government based its contentions that defendants' architect-developer arrangement was illegal and that the failure to disclose it was "false" or "misleading". Moreover, as placed before the jury, the "that's illegal" portion of Burnett's testimony was the prime piece of evidence of both the illegality of defendants' conduct as well as their knowledge thereof.[7/]

But, once again, I concur in the

7. If the Copeland Act does not apply, I would hold that the failure of the court below to limit the admission of Burnett's testimony to proof of notice of possible illegality--which failure allowed it to appear that defendant's own counsel on the involved projects was testifying that defendants' conduct was "illegal"--was plain error under Federal Rule of Civil Procedure 52(b). If the Act does apply, however, it would provide a sufficiently strong basis for calling the arrangement illegal, and the failure to give a limiting instruction, though still error, would not be so egregious that we should recognize it without a proper contemporaneous objection.

result, for I believe that a properly instructed jury could find that defendants' architect-developer agreement did involve a "kickback" in violation of the Copeland Act and that the trial court, therefore, was in error in dismissing the Copeland Act count. The double jeopardy clause and 18 U.S.C. § 3731 (appeal by United States) may well forbid the Government from appealing the dismissal of the count for purposes of reinstating the indictment as to it. See United States v. Martin Linen Supply Co., 45 U.S.L.W. 4337 (U.S. April 4, 1977); United States v. Morrison, 45 U.S.L.W. 3276 (U.S. Oct. 12, 1976); United States v. Jenkins, 420 U.S. 358 (1975); United States v. Wilson, 420 U.S. 332 (1975). We are free, however, to examine the propriety of the dismissal to determine whether, instead of being prejudiced by an alleged improper omission from the

jury charge, the defendants in fact received more generous treatment than they deserved by virtue of the dismissal and, therefore, now have no cause to complain that an improper dismissal was not clearly explained. Cf. United States v. Lemon, No. 76-1443 at 316-17 (9th Cir. March 8, 1977)(slip opinion); United States v. King, Nos. 75-2424, 75-2934, at 24 (9th Cir. Dec. 16, 1976) (slip opinion), cert. denied, 45 U.S.L.W. 3690 (U.S. April 18, 1977).

While it may be true, as the district court apparently held, that the legislative history of the Copeland Act reveals that it was passed in order to prevent contractors from avoiding those minimum wage laws which govern federal construction, see United States v. Carbone, 327 U.S. 633, 638-39 (1946) (discussing in detail the Copeland Act's legislative history), the words of the

statute are clear in their generality:

> Whoever, by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever induces any person employed in the construction, prosecution, completion or repair of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, to give up any part of the compensation to which he is entitled under his contract of employment, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 874. We must observe the admonition of the Supreme Court--repeated recently in Santa Fe Indus., Inc., v. Green, 45 U.S.L.W. 4317, 4320 (U.S. March 23, 1977), quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975)(Powell, J. concurring)--that "'[t]he starting point in every case involving the construction of a statute is the language itself.'" On the face of the Copeland Act, there is no indication that Congress intended to limit its reach

to the minimum wage context. Nor is there any ambiguity which would compel a resort to the legislative history. See Ex parte Collett, 337 U.S. 55, 61 (1949); Packard Motor Car Co. v. NLRB, 330 U.S. 485, 492 (1947); United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 543 (1940); United States v. Sabatino, 485 F.2d 540, 544 (2d Cir.1973), cert. denied, 415 U.S. 948 (1974).[8/] I would, therefore, heed the sardonically expressed teaching of Mr. Justice Frankfurter that

> this is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute[,]

Greenwood v. United States, 350 U.S. 366, 374 (1956), quoted in Van Hoomissen v.

8. I am cognizant that, in the criminal context, ambiguity with respect to a statute's ambit should be resolved in favor of lenity. Rewis v. United States, 401 U.S. 808, 812 (1971). I, however, find no ambiguity in the Copeland Act. Compare Sabatino, 485 F.2d at 544.

Xerox Corp., 503 F.2d 1131, 1133 (9th Cir.1974), and hold that the Copeland Act count was improperly dismissed.

On these grounds, I would Affirm.

/s/ Herbert L. C. Choy
United States Circuit Judge

ELY, Circuit Judge (dissenting)

I respectfully dissent. The results reached by my Brothers in their respective opinions are not acceptable to me.

HEARSAY

Like Judge Choy, I agree that Freeman, however ill-considered, is controlling here. I do not agree, however, that Burnett's statement was, in any event, admissible under the "excited utterance" exception to the hearsay rule. Fed. R. Evid. 803(2). In my judgment, the record does not lead to the firm belief that Burnett spoke "under the immediate and uncon-

trollable domination of the senses . . . ." 6 Wigmore, Evidence § 1747 at 195 (Chadbourn rev. 1976). Accordingly, I would reverse under the compulsion of Freeman.

COPELAND ACT

Again, like Judge Choy, I cannot agree with our Brother Duniway's conclusion that the District Court's failure to instruct the jury comprehensively in respect to the dismissal of the Copeland Act (Act) count of the indictment resulted in no more than harmless error. Unlike my Brother Choy, however, I cannot conscientiously agree to affirm, even assuming arguendo, that the District Court erred in dismissing the Copeland Act count of the indictment.[1/] This is especially

1. Judge Choy insinuates that the offense charged under the Copeland Act was erroneously dismissed and that, hence, the appellants are in no position to complain about those remarks of the prosecutor that were pertinent only to that Act. As I see it, this approach is not only illogical, but also it is contrary to the most basic tradi-

so because of the prosecutor's references during his closing argument to the Copeland Act (R.T. 970-71), to Burnett's statement in respect to the illegality under the Act of the developer-architect relationship (R.T. 970-71, 973-74, 1063-64), and to illegal kickbacks (R.T. 987-88). Thus, I submit that my Brother Duniway's statement that "only one" possibly prejudicial remark was made by the prosecutor is inaccurate, as well as quite lame. Even if we assume that only one unfair blow was struck, it was a fatal blow.

1. (Cont.) tional concept of an orderly trial. Even if a trial judge issues erroneous rulings, ethical trial counsel are obliged to abide by those rulings. The approach taken by my Brother Choy, if adopted, could lead to intolerable consequences. It would encourage an attorney, believing that the trial court had erred (e.g., in dismissing a charge based upon a specific statute, as here), to defy the judge by uttering forbidden comments in the hope that an appellate court would hold that the trial court's basic ruling was erroneous and, for that reason, forgive, or hold harmless, the attorney for conduct that would otherwise be prejudicial to the accused and contemptuous of the court.

As Judge Choy emphasizes, the "that's illegal" portion of Burnett's testimony was the single most damaging part of the evidence concerning the illegality of the appellants' conduct and, of course, their alleged knowledge thereof. The district judge, acting properly within his discretion, had sternly admonished defense counsel not to utilize the dismissal of the Copeland Act count as a "sword" during closing argument. As the proceedings developed, however, this was a "sword" that defense counsel sorely needed to defend his clients against the prosecutor's continued offensive use of Burnett's exclamation that the developer-architect relationship violated the Act. Whether or not the prosecutor intended only to impress the jury with the thought that the appellants had not followed the advice of their attorney, the pivotal consideration is

that the jury had no way of knowing whether the Act mentioned by the prosecutor was the basis of the count that had been dismissed. To me, it is logical to infer that the prosecutor's reference to the Act during closing argument, after the trial judge had mentioned that certain aspects of the indictment had been dismissed, would lead the jury to believe that the Copeland Act count of the indictment remained in force. I find nothing in the eventual instructions to the jury to dispel such a notion. Moreover, I do not consider defense counsel's two references to the Act (R.T. 998, 1046-47) to be an adequate substitute for proper jury instructions. The remarks of an advocate do not bind the jury, but the court's instructions do, strictly and literally. It is entirely conceivable, therefore, that the conviction eventually rested upon an offense

no longer charged.

I cannot say that the prosecutor spoke with malice, either when he referred to the Act, or when he repeatedly emphasized Burnett's expletive. On the other hand, I have found no precedent allowing a prosecutor to comment, during his summation, on a previously dismissed count of an indictment. To permit his doing so, particularly when defense counsel has been so sternly warned not to refer to it, seems to me to be thoroughly wrong. The prosecutor's improper comment on the Act, fortified and emphasized by subsequent references to Burnett's inadmissible damaging statement and to the kickbacks, grievously prejudiced the defendants and, in my opinion, could not possibly have been cured by any instruction to the jury. The appellants, in fairness, should be tried anew.

I would reverse.

/s/ Walter Ely
United States Circuit Judge

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Petition for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit on the counsel for respondent by enclosing a copy thereof in an envelope, postage prepaid, addressed to:

The Hon. Robert H. Bork
Solicitor General of the
United States
Department of Justice
Washington, D. C. 20530

Mr. Sidney I. Lezak
United States Attorney
P. O. Box 71
Portland, Oregon 97207

and depositing the same in the United States mails at Portland, Oregon, on December 28, 1977, and further certify that all parties required to be served have been served.

Leslie M. Roberts
Of Attorneys for Petitioners